IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Second Appeal No.919 of 2002

Shri Dharma Keda Bhamare .. Appellant

V/s

1. Smt.Vachhalabai Murlidhar Pagar
2. Murlidhar Lala Pagar
3. Karbhari Keda Bhamare
4. Jairam Keda Bhamare
5. Smt.Ganga Keda Bhamare
6. smt.Vachhalabai Bajirao Aher
7. Smt.Yamunabai Bajirao Shinde
8. Prabhavati Rajaram Jadhav ..Respondents

Shri R.A.Thorat for Appellant

None for the Respondents

CORAM:S.R.SATHE,J.

DATED:21st June 2005

**P.C.** :-

1. The Appellant-original defendant no.1, against whom decree for specific performance of an agreement to sale was passed and counter claim for restoring the possession was dismissed by the trial court and confirmed by the first Appellate Court,

has filed the present Second Appeal.

2. The defendant by virtue of an agreement to sell dated 24-7-1981 agreed to sell the suit land admeasuring 40 Ares to plaintiff for Rs.42,500/- and accepted Rs.21,500/- as an Earnest money. As per agreement the balance amount was to be paid on or before 31-3-1982 or on receiving payment of the sugar cane bill of the year 1982 or even before that and sale deed was to be executed. After the execution of an agreement to sale, it became necessary to obtain permission from the Collector for the said transaction. The defendant, however, did not take steps for the same. The plaintiff made an attempt to pay the balance amount to the defendant. However, the defendant did not accept the said amount and showed unwillingness to execute the sale deed. Plaintiff, therefore, issued a notice through Advocate to the defendant on 10-12-1985 calling upon the defendant to obtain the permission and executed the sale deed. The defendant by his reply dated 15-12-1986 refused to execute the sale deed, hence plaintiff filed suit for specific performance on 16-4-1987.

3. The defendant no.1 filed his written statement and resisted the suit claim on several grounds. He contended that time was the essence of the contract and plaintiff did not file the suit in time. He

also contended that plaintiff was not ready and willing to perform his part of the contract. He also contended that plaintiff was not in a position to pay the balance amount. Lastly, he contended that at one point of time plaintiff had in fact asked for refund of earnest money but as defendant was not in a position to pay the same he gave possession of his land to the plaintiff and asked him to take sugar cane crop out of the said land for 3 years and thus income derived from the said land was adjusted towards the earnest money.

4. After considering the evidence on record the trial Court came to the conclusion that the plaintiff has proved the suit claim. He, therefore, passed the decree for specific performance against the defendant. The said decree was challenged by the defendant in the court of Additional District Judge,Nasik. However, the first Appellate Court also held that decree passed by the lower Court was legal and correct and therefore confirmed the same. The first Appellate Court also observed that during the pendency of the appeal the defendant amended his written statement and contended that during pendency of the appeal plaintiff obtained forcible possession of the suit land and as such he asked for restoration of the said possession by way of counter claim. However, the said counter claim was also dismissed by the

first Appellate Court.

5. Shri R.A.Thorat, learned Advocate for the Appellant original defendant submitted that the courts below failed to consider the provisions of Section 16(1)(c) of Specific Relief Act and as such substantial question of law is involved in the instant appeal. Secondly, he also canvassed before me that whether the lower Appellate Court erred in not framing an issue in respect of counter claim is a substantial question of law and the order passed by the first appellate Court with regard to the counter claim is liable to be set aside on that count. Lastly, he submitted that whether the courts below were right in holding that the suit was in time is also another substantial question of law.

6. On perusal of the judgments of the Courts below it is very clear that both the Courts have considered the entire evidence on record extensively. It is an admitted fact that defendant has executed an agreement to sell in question. It is true that there is no mention of handing over of possession to the plaintiff at the time of agreement to sell. However, the plaintiff has adduced evidence to show that such possession was handed over. The said evidence of the plaintiff is corroborated by documentary evidence. Admittedly,

for long time plaintiff is in actual possession of the land in question. Though the defendant took the contention that possession was handed over to the plaintiff by some arrangement, the defendant totally failed to adduce any evidence in that behalf and as such the lower court rightly negatived the said contention. So, the lower court after considering every aspect of the matter rightly arrived at the conclusion that defendant has failed to prove the contention regarding the plaintiff taking forcible possession. Naturally, the first appellate Court has rightly dismissed the defendant's counter claim. Merely because no specific issue regarding the counter claim was framed by first appellate court one cannot jump to the conclusion that the said lacuna was fatal. It is evident that point with regard to counter claim was argued by both sides and the same has been dealt by the first appellate court. There is nothing to show that non framing of specific issue with regard to counter claim has caused any prejudice to the defendant. So, there is absolutely no evidence in the argument advanced by the learned advocate for the appellant-defendant in this behalf.

7. From perusal of the record it is very clear that point with regard to readiness and willingness of the plaintiff to perform the contract has not

been taken as a ground in appeal memo. The defendant has in fact not set out any such specific question of law in the appeal memo. Besides this from the perusal of judgments of both the courts it is very clear that evidence with regard to readiness and willingness has been considered in its proper perspective. The plaintiff has adduced sufficient evidence to show that he had deposited balance consideration price in the account of one Sampat who was admittedly mediator in the suit transaction. Not only that but plaintiff as well as the said Sampat have deposed that both of them had gone to the defendant no.1 and requested him to take the amount and execute the sale deed but he refused. It has also come on record that plaintiff is in fact having some Bagayat land so merely because at particular point of time in one account of the plaintiff there was no sufficient balance, one cannot jump to the conclusion that the plaintiff was not ready and willing or that his financial position was such that it was not possible for him to purchase the property. In order to substantiate his argument the learned Advocate for the defendant has placed reliance on a case N.P.Thiruganaam (Dead) by Lrs V/s Dr.R.Jagan Mohan Rao and Ors. reported in **(1995) 5 Supreme Court Cases, 115**. However, the facts of the said case and facts of the case in hand are quite different. In that case there was no evidence to

show that plaintiff was having such amount or that he had gone to the defendant with the said amount. While in the instant case it is proved that the plaintiff was in a position to pay the said amount and had actually gone to the defendant with balance amount. Hence the said ruling will not help the defendant. So,I do not think that any substantial question of law with regard to application of Section 16(1)(c) is involved in the instant case.

8. From the averments in the agreement to sale it is very clear that sale deed was to be executed on or before 31-3-1982 or on receipt of payment of sugar cane crop of the year 1982. It cannot be said that the sale deed was to be executed at the end of March 1982. No specific evidence is adduced by the defendant to show that payment of sugar cane of the year 1982 was received by the plaintiff in 19082 or thereabout. Admittedly, after the execution of the agreement to sell due to subsequent developments and then existing law, it was necessary to obtain permission of the Collector for such sale transaction. So, having regard to all these aspects it is very clear that no substantial question of law is involved in the present appeal. There is nothing on record to indicate that the first appellate court has not properly considered the evidence on record or finding recorded by it is perverse.

9. Hence the appeal is dismissed in limene.

( S.R.SATHE,J.)